LIBRARY
SUPREME COURT, U. S.

FILED
OCT 10 1951
CHARLES ELMORE CROPLEY
CLERK

No. 379

In the Supreme Court of the United States

OCTOBER TERM, 1951

RALPH CASEY, GEORGE LaCLAIR and EDWARD PLESA,
Petitioners,

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

and

BRIEF IN SUPPORT THEREOF

F. M. REISCHLING,
634 Central Building,
Seattle, Washington.
Counsel for Petitioners

WARREN CHAN
634 Central Building,
Seattle, Washington.
Of Counsel for Petitioners

THE ARGUS PRESS, SEATTLE

No. .....

In the Supreme Court of the United States

OCTOBER TERM, 1951

RALPH CASEY, GEORGE LaCLAIR and EDWARD PLESA,
Petitioners,

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

and

BRIEF IN SUPPORT THEREOF

F. M. REISCHLING,
634 Central Building,
Seattle, Washington.
Counsel for Petitioners

WARREN CHAN
634 Central Building,
Seattle, Washington.
Of Counsel for Petitioners

THE ARGUS PRESS, SEATTLE

INDEX

	Page
PETITION FOR WRIT OF CERTIORARI	1
Statement of the Case and the Matters Involved	1
Jurisdictional Statement	6
1. Jurisdiction of the Court	6
2. The Decision and Judgment of the Court of Appeals	6
3. Basis upon which it is contended the Supreme Court has jurisdiction and cases in support thereof	7
The Questions Presented	9
Points Relied Upon for the Issuance of the Writ of Certiorari	10
BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI	13
Opinions Below	13
Jurisdiction	14
Statement of the Case	14
Specifications of Errors	14
Constitutional and other Provisions Involved	14
Argument	15
Summary of Argument	15
Point One	15
Point Two	20
Point Three	23
APPENDIX	27
Fourth Amendment to the United States Constitution	27
Fifth Amendment to the United States Constitution	27
Section 318, Title 47, U.S.C.A.	27
Section 301, Title 47, U.S.C.A.	28
Section 1254, Title 28, U.S.C.	29
Section 2101, Title 28, U.S.C.	30
Section 3041, Title 18, U.S.C.	30
Section 3052, Title 18, U.S.C.	31
Section 3053, Title 18, U.S.C.	31

Page

Section 781(b), Title 49, U.S.C. 32
Court Rules 33
Revised Rules of the Supreme Court,
Rule 36 (28 U.S.C.A.) 33
Rule 38 (28 U.S.C.A.) 34

TABLE OF CASES

Agnello v. United States, 269 U.S. 20, 70 L.ed. 149 (1925) 7, 11, 15, 20
Amos v. United States, 255 U.S. 313, 65 L.ed. 654 (1921) 19, 23
Byars v. United States, 273 U.S. 28, 71 L.ed. 520 (1927) 7, 15, 20
Carroll v. United States, 267 U.S. 132, 69 L.ed. 543 (1925) 15, 20, 21
Federal Radio Commission v. Nelson Bros. Co., 289 U.S. 266, 285, 77 L.ed. 1166 (1933) 24
Go-Bart Co. v. United States, 282 U.S. 344, 75 L.ed. 374 (1931) 7, 11, 15, 20, 22
Gouled v. United States, 225 U.S. 298, 65 L.ed. 647 (1921) 19, 23
Harris v. United States, 331 U.S. 145, 91 L. ed. 1399 (1947) 22
Lefkowitz v. United States, 285 U.S. 452, 76 L.ed. 877 (1932) 22
Lustig v. United States, 338 U.S. 74, 93 L.ed. 1819 (1946) 7, 11, 15, 20
National Broadcasting Company v. United States, 319 U.S. 190, 225, 87 L.ed. 1344 (1943) 24
Panama Refininig Co. v. Ryan, 293 U.S. 388, 79 L.ed. 446 (1935) 11, 15, 23
Schechter Corp. v. U.S., 295 U.S. 495, 79 L.ed. 1570 (1935) 11, 15, 23
United States v. DeRi, 332 U.S. 581, 92 L.ed. 210 (1941) 20, 21
United States v. Kirschenblatt, 16 F.(2d) 202, 51 A.L.R. 416 22
United States v. Rabinowitz, 339 U.S. 56, 94 L.ed. 653 (1950) 22

STATUTES

	Page
Sec. 3041, Title 18, U.S.C.	22, 30
Sec. 3052, Title 18, U.S.C.	22, 31
Sec. 3053, Title 18, U.S.C.	22, 31
Sec. 1254, Title 28, U.S.C.	6, 14, 29
Sec. 2101, Title 28, U.S.C.	6, 14, 30
Sec. 301, Title 47, U.S.C.	1, 6, 8, 10, 14, 15, 23, 24, 27
Sec. 318, Title 47, U.S.C.	2, 6, 8, 9, 10, 11, 14, 15, 23, 24, 27
Sec. 781, *et seq.*, Title 49, U.S.C.	20, 31
Sec. 1254, Title 28, U.S.C.A.	14
Sec. 2101, Title 28, U.S.C.A.	14

CONSTITUTION

United States Constitution:	
Fourth Amendment	7, 10, 27
Fifth Amendment	10, 27

RULES

Revised Rules of the Supreme Court, Rules 36 and 38 (28 U.S.C.A.)	6, 14
Federal Rules of Criminal Procedure, Rule 37(b) (18 U.S.C.A.)	6, 14

In the

Supreme Court of the United States

OCTOBER TERM, 1951

RALPH CASEY, GEORGE LACLAIR and EDWARD PLESA, *Petitioners*,

v.

UNITED STATES OF AMERICA, *Respondent*.

No. .....

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The petition of Ralph Casey, George LaClair and Edward Plesa for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit respectfully shows:

STATEMENT OF THE CASE AND THE MATTERS INVOLVED

The petitioners were convicted in the District Court of the Western District of Washington, Northern Division, on six counts of an indictment, three of which charged them with operation of radio apparatus for the transmission of energy, communications and signals without first obtaining a station license, all in violation of Section 301, Title 47, United States Code, and three

of which charged them with operating radio apparatus for the transmission of energy, communications and signals without first obtaining a radio operator's license, the radio apparatus being set up as a radio station for which a radio station license is required, all in violation of Section 318, Title 47, U.S.C. (R. 2-6).

As the result of a complaint made by the Police Department of the city of Everett, Washington, to the Federal Communications Commission in Seattle, Washington, to the effect that an unlicensed radio transmitter had been used by unknown individuals to bilk race track "bookies" out of a large sum of money, the officer in charge of the Federal Communications Commission in Seattle commenced an investigation for the purpose of locating said transmitter. The investigation was commenced on or about January 25, 1949 (R. 90-91, 207-208) by Federal Communications Commission radio engineers, who are not law enforcement agents or officers. On February 2, 1949, a complaint was received that a broadcast had been made on a frequency of 3936 kilocycles (R. 52). No complaints other than this were received between that time and February 7, during which time the investigation had been proceeding by the Federal Communications Commission, excepting from two amateurs who heard an unidentifiable signal about 7:10 P.M. on February 7, 1949, in the State of Oregon (R. 40-41, 48-49). The signals heard on February 7 were on a frequency of approximately 3540 kilocycles. The Federal Communications Commission investigators were unable to locate any unauthorized signal on a frequency of 3936 kilocycles, but did hear a voice testing for modu-

lation on a frequency of 3540 kilocycles (R. 53). Because they heard no call letters, they concluded that they were listening to an unlicensed station.

On February 10, 1949, at about 12:26 P.M., the engineer-investigators again heard a signal which they concluded was emanating from the Benjamin Franklin Hotel, located on the corner of Fifth and Virginia Streets in Seattle, Washington (R. 66-67). Three of them entered the hotel, and, using a direction finder, determined that the signal was coming from room 1217. The investigators did not know at this time to whom the room had been registered, nor had they seen the persons registered in that room. The investigator in charge heard a voice saying, "Testing 1-2-3-4 for modulation." This was at 1:46 P.M. The Federal Communications Commission investigators returned to the lobby and checked the hotel records and discovered that the room was registered in the names of the petitioners (R. 71). The investigator in charge then left the hotel and went to the United States Court House to secure a warrant for the arrest of the appellants. He left at about 1:52 P.M. Two other investigators remained in the lobby of the hotel for a few minutes and then returned to their office. Upon arriving there, one of them received a telephone call from the hotel manager (R. 192, 212-213) who stated that petitioners were about to check out and that their car was located at the Motor Ramp Garage (R. 192-193, 212-213). Thereupon, one of the investigators telephoned the attendant at the garage, stating he was a federal officer and requesting the attendant to disable the car so that it could not be moved prior to the

arrest of the petitioners. This was sometime between 1:52 P.M. and 2:15 P.M. (R. 193, 224-225). The attendant complied with this request by disabling petitioners' car (R. 225-226). Immediately after this, these two engineer-investigators went to the Motor Ramp Garage, a garage not connected with the hotel but independently operated, located at Sixth and Westlake, Seattle, Washington, approximately eight blocks from the Federal Court House and two blocks from the Benjamin Franklin Hotel, arriving there at 2:15 P.M. (R. 140). When they first entered the garage, they talked to an attendant there, had the attendant point out the car of the petitioners (a 1948 Packard convertible coupe) (R. 141-142), asked the attendant to unlock the car, which was done, and they then searched the automobile and the baggage, and then returned the baggage to the car (R. 227-228). One of them then had a telephone conversation with the engineer in charge of the Federal Communications Commission as the result of which he went out to obtain the services of a policeman to prevent the petitioners from moving the car in the event they attempted so to do until a warrant for their arrest could be served (R. 143). A warrant for the arrest was subsequently issued and was served by Marshal Scully upon the petitioners in room 1217 of the Benjamin Franklin Hotel at 3:20 P.M. The Marshal searched the room but discovered nothing (R. 72-74). Following the arrest, the Federal Communications Commission investigators, who were neither law enforcement officers nor agents, again returned to the Motor Ramp Garage and removed the articles theretofore discovered from the automobile,

which articles consisted of radio transmitting equipment and a receiver.

Between 1:47 P.M., when the Federal Communications Commission investigator went to the Court House to get a warrant for arrest, and 3:20 P.M., when the arrest was made, a search had been made of the petitioners' automobile in a garage several blocks from the place where the arrest was made subsequently, said search being made without warrant, although a magistrate was then available and no apparent necessity for a search without a warrant existed (R. 19-21, 108, 155), and said search and subsequent seizure of petitioners' property was made by persons who were not law enforcement officers and who, under any circumstances, had no right to make a search and seizure with or without warrant.

Motion to suppress the evidence thus obtained was made prior to trial (R. 12-14). Two of the Federal Communications Commission investigators filed counter-affidavits in resistance to the motion. In both of the affidavits the investigators described themselves as engineers; in neither was there any intimation that the investigators were law enforcement agents or otherwise had the right or authority to search and seize the property of petitioners (R. 14, 17-21).

Thereafter, petitioners objected to the introduction of the articles seized (R. 76-77) and renewed their objection at the conclusion of the Government's case (R. 231-236). These objections were overruled by the trial court. After the jury returned a verdict against petitioners, petitioners moved for a new trial on the ground,

inter alia, that the trial court erred in failing to suppress the evidence thus obtained.

On the appeal to the Court of Appeals, that court held that petitioners were not entitled to claim the constitutional protection from unreasonable searches and seizures on the ground that they did not claim ownership or interest in the radio equipment seized.

In the appellate court, petitioners further claimed that Sections 301 and 318, Title 47, U.S.C., were unconstitutional because of an improper delegation of legislative power to the Federal Communications Commission because the statute delegated to the Commission arbitrary discretion to waive or modify certain provisions therein and determine whom shall be prosecuted for violation thereof, and said statute set up no standard by which this discretion could be measured. The Court of Appeals rejected this contention and held that the statute set up a standard of public convenience and necessity which was sufficient and adequate.

JURISDICTIONAL STATEMENT

1. Jurisdiction of the Court

The jurisdiction of this court is invoked under Section 240a of Judicial Code as amended, Title 28 U.S.C. Sections 1254, 2101 (28 U.S.C.A. Sections 1254, 2101). See also Rules 36 and 38, Revised Rules of the Supreme Court, 28 U.S.C.A.; Rule 37b, Federal Rules of Criminal Procedure, 18 U.S.C.A.

2. The Decision and Judgment of the Court of Appeals.

The decision and Judgment of the Court of Appeals was rendered on June 27, 1951 (as amended by order of

September 14, 1951) (R. 328). This petition, with supporting brief, and the certified record are filed within thirty days next after denial of Petition for Rehearing.

3. Basis Upon Which It Is Contended the Supreme Court Has Jurisdiction and Cases in Support Thereof.

The basis upon which it is contended that the Supreme Court has jurisdiction herein and the cases believed to support such jurisdiction are as follows:

a. The opinion of the Court of Appeals upholds a conviction of the petitioners upon a record which shows a search and seizure of petitioners' personal property and effects was made without warrant, one hour prior to the arrest, by a Federal investigator who never made the arrest and in the absence of the petitioners who were subsequently arrested, said search and seizure being in violation of petitioners' rights under the Fourth Amendment to the Constitution of the United States. *Go-Bart Co. v. United States,* 282 U.S. 344; *Lustig v. United States,* 338 U.S. 74.

b. The opinion of the Court of Appeals upholds the conviction of petitioners upon a record which shows that evidence unlawfully seized in violation of petitioners' constitutional rights was admitted over their objections. *Angello v. United States,* 269 U.S. 20; *Byars v. United States,* 273 U.S. 28.

c. The opinion of the Court of Appeals upholds the conviction of petitioners upon a statute which is unconstitutional insofar as it delegates authority to the Federal Communications Commission to exercise discretion in the determination to waive or modify pro-

visions of said section and to arbitrarily determine whom shall be prosecuted for violation thereof, said statute being Sections 301 and 318 of Title 47, U.S.C. pp. 4072 and 4076 to 4077, which reads as follows:

"Section 301, Title 47, U.S.C.A.—License for radio communication or transmission of energy:

"It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission * * *. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any Territory or possession of the United States or in the District of Columbia to another place in the same Territory, possession, or District; or (b) from any State, Territory or possession of the United States, or from the District of Columbia to any other State, Territory or possession of the United States, or (c) from any place in any State, Territory or possession of the United States to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States; or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this chapter and

with a license in that behalf granted under the provisions of this chapter."

Section 318, Title 47, U.S.C.A.:

"The actual operation of all transmitting apparatus in any radio station for which a station license is required by this Chapter shall be carried on only by a person holding an operator's license issued hereunder, and no person shall operate any such apparatus in such station except under and in accordance with an operator's license issued to him by the Commission: Provided, however, That the Commission, if it shall find that the public interest, convenience or necessity will be served thereby may waive or modify the foregoing provisions of this section for the operation of any station except (1) stations for which licensed operators are required by international agreement, (2) stations for which licensed operators are required for safety purposes, (3) stations engaged in broadcasting, and (4) stations operated as common carriers on frequencies below thirty thousand kilocycles: Provided further, That the Commission shall have power to make special regulations governing the granting of licenses for the use of automatic radio devices and for the operation of such devices."

THE QUESTIONS PRESENTED

The questions presented and raised by this petition are as follows:

1. Whether the Court of Appeals erred in holding that petitioners were not entitled to claim their constitutional protection from unreasonable search and seizure for failing to claim ownership or an interest in the articles seized.

2. Whether Federal administrative officers have the right, without warrant, to search and seize personal property of the petitioners in petitioners' automobile, such search and seizure being made in the absence of petitioners and not incidental to a lawful arrest.

3. Whether the trial court upon petitioners' motion to suppress evidence unlawfully seized from petitioners in violation of their rights under the Fourth and Fifth Amendments to the Constitution, which motion was heard prior to trial upon affidavits and oral arguments, and upon petitioners' objection to admission of said evidence during trial, should not have ordered the evidence articles seized suppressed for use as evidence and have sustained petitioners' objection to their admission in evidence.

4. Whether the Court of Appeals shall not have held Sections 301 and 318 of Title 47, U.S.C., unconstitutional for the reason that this statute delegated arbitrary powers to the Federal Communications Commission to waive or modify the provisions of said sections to determine whom shall be prosecuted for violation thereof, there being no proper standard set up therein to guide a proper use of discretion.

POINTS RELIED UPON FOR THE ISSUANCE OF THE WRIT OF CERTIORARI

1. The opinion of the Court of Appeals holding that petitioners did not claim ownership or an interest in the articles seized is contrary to the sole and only evidence on this point.

2. The opinion of the Court of Appeals upholding

the search and seizure is in direct conflict with applicable decisions of this court such as *Agnello v. United States*, 269 U.S. 20; *Go-Bart Importing Co. v. United States*, 282 U.S. 344; *Eustig v. United States*, 338 U. S. 74.

3. The opinion of the Court of Appeals holding that an adequate standard was set up in Section 318, Title 47, U.S.C., is contrary to the decisions of this court in *Panama Refining Co. v. Ryan*, 293 U.S. 388, and *Schechter Corp. v. United States*, 295 U.S. 495.

Wherefore, and for the reasons herein stated, petitioners respectfully pray that this Honorable Court issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to the end that the questions involved may be fully presented and argued and justice done in the premises.

Dated, Seattle, Washington,
October 5, 1951.

RALPH CASEY,
GEORGE LACLAIR,
EDWARD PLESA,
Petitioners.

F. M. REISCHLING,
634 Central Building,
Seattle, Washington.
Counsel for Petitioners

WARREN CHAN
634 Central Building,
Seattle, Washington.
Of Counsel for Petitioners

No.....

In the
Supreme Court of the United States

OCTOBER TERM, 1951

RALPH CASEY, GEORGE LACLAIR and EDWARD PLESA,
Petitioners,

v.

UNITED STATES OF AMERICA, *Respondent.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

F. M. REISCHLING,
634 Central Building,
Seattle, Washington.
Counsel for Petitioners

WARREN CHAN
634 Central Building,
Seattle, Washington.
Of Counsel for Petitioners

THE ARGUS PRESS, SEATTLE

In the

Supreme Court of the United States

OCTOBER TERM, 1951

RALPH CASEY, GEORGE LACLAIR and EDWARD PLESA, *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

No. .....

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The judgment of the trial court was rendered on the 12th day of September, 1949 (R. 24).

The opinion and judgment of the Court of Appeals was rendered and filed on June 27, 1951 (as amended by order of September 14, 1951) (R. 326, 327). The opinion of the Court of Appeals will be found on page 318 of the Record.

The petition for rehearing was denied by the Court of Appeals on September 14, 1951 (R. 328).

JURISDICTION

The date of the judgment to be reviewed is June 27, 1951 (R. 327), and the date of the Denial of the Petition for Rehearing is September 14, 1951 (R. 328).

The jurisdiction of this court is invoked under Section 240a of Judicial Code as amended, Title 28 U.S.C.,

Secs. 1254, 2101 (28 U.S.C.A. Secs. 1254, 2101). See also Rules 36 and 38, Revised Rules of the Supreme Court (28 U.S.C.A.); Rule 37b, Federal Rules of Criminal Procedure, 18 U.S.C.A.

STATEMENT OF THE CASE

A full statement of the case has been heretofore given in the Petition for Certiorari, and for the sake of brevity the statement is not repeated here.

SPECIFICATION OF ERRORS

1. The Court of Appeals erred in holding that petitioners were not entitled to invoke the constitutional protection against unreasonable searches and seizures for failing to claim ownership or an interest in the articles seized.

2. The Court of Appeals erred in not holding that the search and seizure was unlawful and unreasonable.

3. The Court of Appeals erred in holding that Secs. 301 and 318 of Title 47, U.S.C., set up a sufficient and adequate standard to measure administrative discretion and was, therefore, constitutional.

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

Constitutional and other provisions involved are set forth in appendix pages 27 to 35, *infra*.

ARGUMENT

Summary of Argument

1. Contrary to the sole and only evidence in the record as to petitioners' ownership of the seized articles, the Court of Appeals held that petitioners did not claim ownership of the seized articles and, hence, were not entitled to invoke the constitutional guarantee against unreasonable searches and seizure.

2. In failing to hold that the search and seizure was unlawful and unreasonable, the decision of the Court of Appeals was contrary to prior decisions of this court. *Agnello v. United States,* 269 U.S. 20; *Byars v. United States,* 273 U.S. 28; *Go-Bart Co. v. United States,* 282 U.S. 344; *Lustig v. United States,* 338 U.S. 74.

3. The decision of the Court of Appeals in holding Secs. 301 and 318 of Title 47, U.S.C. constitutional is in conflict with prior decisions of this court. *Panama Refining Co. v. Ryan,* 293 U.S. 388; *Schecter Corp. v. United States,* 295 U.S. 495.

Point One

Throughout the entire trial of the case, the United States Attorney tacitly conceded petitioners' ownership of the radio equipment and urged only, as the basis for denial of the motion to suppress, that the facts in the case were governed by the decision in *Carroll v. United States,* 267 U.S. 132. The trial court specifically denied petitioners' motion on the basis of the *Carroll* case (R. 235). On the appeal, the Court of Appeals apparently agreed with counsel for petitioners that the *Carroll* case was not controlling, but the appellate court

then proceeded to deny petitioners the right to claim the protection of the Constitution against unreasonable search and seizure on the ground that petitioners did not claim ownership of or an interest in the articles seized (R. 323). This is contrary to the theory upon which the case was tried and contrary to the sole and only evidence on this point in the case.

The evidence clearly showed ownership in the petitioners. The testimony was that petitioner George LaClair *bought the equipment for* $50.00. His testimony is as follows:

> "Q. With reference to Plaintiff's Exhibits 5 and 6, the radio transmitter and equipment, when did you first see the items contained in those two exhibits?
>
> A. Well, the items contained in the exhibit I seen the early part of that week. We got there Sunday night, I would say it was either Monday or Tuesday. I didn't see the case, the suitcase I didn't see. I seen the contents of it, but not the suitcase.
>
> Q. Where was it that you saw it?
>
> A. In Olympia, Washington.
>
> Q. Who was present?
>
> A. There was Casey, Plesa, there was two other gentlemen present and myself.
>
> Q. Name who the other gentlemen were.
>
> A. One fellow's name was Johnny Wilcie, and the other gentleman, I don't know his name. I know him by sight but I don't know his name.
>
> Q. Where was it?

A. In a restaurant in Olympia.

Q. Where was this equipment?

A. Johnny Wilcie had it.

Q. Did you have a conversation, all of you together, about this equipment?

A. Yes, sir." (R. 250.) * * *

"Q. Then what occurred? Just tell what happened.

A. Well, we didn't do any business with him, we didn't know if we had any use for it, so finally he got to the point where he would take $50. He said the equipment was worth a couple of hundred dollars, *so I bought it for* $50." (R. 252)

"Q. Were you at any time hiding this machine from anybody?

A. No, sir.

Q. Never tried to hide it?

A. No, sir.

Q. Where was the machine going when it was in your car out there in the Motor Ramp Garage?

A. We decided to bring it to a radio man to try to get it so it would work." (R. 256.) * * *

"Q. *You say after the purchase of this that you yourself paid for it but that everybody chipped in, is that correct?*

A. *Yes, sir.*" (R. 258.) * * *

"Q. When John Wilcie sold you that transmitter, did he sell you that 3536 crystal there?

A. Whatever *he sold me is there,* outside of maybe a battery, a battery or the big bag, we bought the big bag." (R. 261) * * *

To the same effect is testimony of petitioner Edward Plesa:

"Q. This Exhibit 5 and 6 which is the transmitter, when did you first see that?

A. I seen it a few days after they came in.

Q. And where did you first see it?

A. Down at Ben Moore's poolroom, I think it was." (R. 267) * * *

"Q. Tell the court and jury what occurred.

A. We went in and was going to start playing pool or something, fooling around in the poolroom there, and he come in and told us he was broke and wanted to leave, wanted to know if he could sell us something, borrow some money at first, and we couldn't give him none, we didn't know him well enough. So he had something he said he would sell us, so we asked him what it was, and he had a couple of boxes in this poolroom right there, and he showed it to us, and told us it was worth more than he wanted for it, *and so we wind up buying it.* He told us we could use it for a shooting range or something like that. He says that is what it has been used for.

Q. *Is that where you got this transmitter then?*

A. *Yes, sir.*

Q. Then you came on up to Seattle with LaClair and Casey, is that right?

A. Yes, sir." (R. 268.) * * *

This is corroborated by testimony of petitioner Ralph Casey:

"Q. Exhibits 5 and 6, you are familiar with the exhibits, aren't you? You know what those are?

A. Yes.

Q. When did you first see those?

A. I seen them down in this poolroom down there. That is the first I ever seen them.

Q. *Did you and George LeClair obtain them at that poolroom?*

A. *Yes.*

Q. *From whom did you obtain them?*

A. *John Wilcie.*" (R. 274.) * * *

"Q. *After you obtained this equipment, which is Plaintiff's Exhibits 5 and 6, did you go out and purchase a bag to carry it in?*

A. *Yes, we did.*

Q. Who was with you on that occasion?

A. *George LaClair and Eddie Plesa.*" (R. 275) * * * (Emphasis supplied.)

Even though the fact of ownership was not clearly brought out in petitioners' affidavit before trial in support of the motion to suppress, after the evidence in the trial clearly showed that petitioners owned the property, the trial court should have granted petitioners' motion to strike the evidence or granted their motion for a new trial because of the failure to suppress the evidence thus unlawfully obtained. *Gouled v. United States,* 225 U.S. 298; *Amos v. United States,* 225 U.S. 313.

Since the Court of Appeals went to such lengths to depart from the theory of the Government's case and held that petitioners were not entitled to constitutional immunity, it would appear that that court was more interested in sustaining the conviction than in deciding the merits of petitioners' case.

Point Two

It is elementary that only unreasonable searches and seizures are prohibited by the Fourth Amendment to the Constitution. *Carroll v. United States,* 267 U.S. 132. If legally obtained, the radio equipment seized was competent evidence in establishing the corpus delicti and identifying the petitioners as parties sought in an investigation of unauthorized radio transmissions. Without this evidence, petitioners would have been entitled to a directed verdict at the close of presentation of evidence.

A search without warrant is not defendable as incidental to a lawful arrest where the search is made by Federal investigators who did not make the arrest and where the search was made in the absence of the persons who were subsequently arrested. *Lustig v. United States,* 338 U.S. 74. Protection under the Fourth Amendment to the Constitution extends to all equally, to those justly suspected as accused as well as to the innocent. *Agnello v. United States,* 269 U.S. 20; *Go-Bart Co. v. United States,* 282 U.S. 344. Any search prosecuted in violation of the Constitution cannot be made lawful by what it brings to light. *Byars v. United States,* 273 U.S. 28; *United States v. DeRi,* 332 U.S. 581.

In the case now before this court, the search and seizure of the property from the automobile involved did not concern contraband articles expressly declared to be subject to seizure and forfeiture by express act of Congress and is, therefore, not within the rule of *Carroll v. United States,* 267 U.S. 132. See also Section 781, et seq., Title 49, U.S.C. (Liquor). As the Supreme

Court said in *United States v. DeRi*, 332 U.S. 581, 584, 585, "Obviously, the court should be reluctant to decide that a search thus authorized by Congress was unreasonable and that the Act was therefor unconstitutional. In view of the strong presumption of Constitutionality due to an act of Congress, especially when it turns on what is 'reasonable,' the *Carroll* decision falls short of establishing a doctrine that, *without such legislation,** automobiles nonetheless are subject to search without a warrant in enforcement of all Federal Statutes. *This court has never yet said so.*"*

The record here discloses that at least one hour prior to the arrest of petitioners, one of the Federal Communications Commission investigators had ordered the disabling of petitioners' car (R. 72-74, 224-226) (which act in itself constituted an arrest without warrant), and he and one other Federal investigator searched petitioners' car and baggage without first obtaining a warrant and discovered the radio equipment. The fact that the investigators at that time returned the articles to the automobile and did not permanently confiscate the articles until after the arrest had been made would not make a subsequent seizure lawful. If the first search, being illegal, reveals the items which are later seized, the fact that the actual confiscation was made with a warrant does not wipe the taint of illegality from the entire search and seizure.

However, the record here shows that *at no time during the entire search and seizure did the investigators procure a search warrant.* That the search and seizure

*Emphasis supplied.

was not incidental to a lawful arrest is amply born out by the record. None of the Federal investigators were in the position of being the arresting officer, as the arrest was made by a Federal Marshal (R. 178-181). In addition, the Federal Communications Commission investigators were not in the class of Federal officers entitled to make arrests, either with or without warrant. Sections 3041, 3052 and 3053 of Title 18, U.S.C. The automobile was located in a garage two city blocks from the place of the arrest, neither the vehicle nor the garage being within an area under the control of petitioners. See *Harris v. United States*, 331 U.S. 145; *United States v. Rabinowitz*, 339 U.S. 56. The search was begun a full hour or more prior to the arrest. It is evident that the search was made solely for the purpose of seizing whatever might be turned up on examination of the baggage in the hope that it might be of evidentiary value in connecting the petitioners with a federal crime under investigation. Such practice has been universally condemned. See *Go-Bart Co. v. United States*, 282 U.S. 344; *Lefkowitz v. United States*, 285 U.S. 452; *United States v. Kirschenblatt*, 16 F.(2d) 202.

When it becomes apparent during the trial that there has been an unconstitutional seizure of the property of the accused, the court should exclude the property and any testimony relating thereto given by the government agents who made the unlawful seizure on motion of the accused made after both testimony and property have been introduced in evidence against him, and this has been held to be the rule even though the trial court prior to trial had denied the motion to suppress.

Amos v. United States, 255 U.S. 313; *Agnello v. United States*, 269 U.S. 20; *Gouled v. United States*, 225 U.S. 298.

In the present case, if the evidence of what the officers found were stricken from the record, there is little left but suspicion that a crime had been committed. There is no corpus delicti, and no case against petitioners. Therefore, judgment against petitioners should be reversed and petitioners discharged and left to go hence free and unfettered.

Point Three

Under prior decisions of this court, it has been established that legislative power is unconstitutionally delegated to administrative or executive officers when the legislation embodies no standard, or no definition of the circumstances and conditions under which the administrative or executive agency is to act. *Panama Refining Co. v. Ryan*, 293 U.S. 388; *Schechter Poultry Corp. v. United States*, 295 U.S. 495. In the *Panama Refining Co.* case, a standard measured in terms of the public good was held to be insufficient. In the instant case, the Court of Appeals held that a standard measured by "public interest, convenience or necessity" was sufficiently adequate (R. 326) to guide the Federal Communications Commission in determining when the provisions of Sections 301, 318 Title 47, U.S.C., should be modified to determine whom should or should not be prosecuted for violation thereof. It is submitted that "public interest, convenience or necessity" is no more susceptible of definition than "public good" and

that the above cited sections of Title 47 U.S.C. are unconstitutional.

In support of its position upholding the constitutionality of Section 318 of the Federal Communications Commission Act, challenged on the ground that it contains an unlawful delegation of legislative authority to the Commission because no standard or guide is set up whereby the exercise of discretion may be measured, the court held that the phrase "public interest, convenience or necessity" is a sufficient standard, and cites two cases as supporting this conclusion. The first case is *Federal Radio Commission v. Nelson Bros. Co.*, 289 U.S. 266, 285. This case had only to do with the exercise of a discretion in the granting or withholding of licenses applied for by radio companies. The second case, that of *National Broadcasting Co. v. United States*, 319 U.S. 190, 225, in effect held that legislative power is not unconstitutionally delegated by the Federal Communications Act of 1934 in empowering the Federal Communications Commission to adopt such regulations applicable to radio stations engaged in chain broadcasting, and further holding that the Federal Communications Commission did not exceed its allowable discretion in adopting regulations providing that a broadcasting license shall not be granted to a radio broadcasting station having certain contracts, agreements, etc., with a network organization which precludes it from broadcasting the programs of other network organizations. These regulations are, of course, always

subject to review by the proper constituted tribunals as provided by the Act. We do not see the similarity of the cases cited to a case where a Federal Communications Commission agent, by his own testimony, determines that if, in his opinion, an individual has violated the law he is guilty of a willful violation thereof notwithstanding the fact that in another section of the country, an equally capable and intelligent man, acting on the same facts but governed by his own personal philosophy, can determine that the man has committed no violation of the law. In other words, without a standard or guide, there can be no uniformity in the enforcement of the provisions of this Act. If the Legislature or the Congress declares the doing or omitting to do of any act to be a crime, it must set up standards by which the average individual can gauge and determine the nature of the violation. We respectfully submit that there is no such standard here. The testimony of Mr. Arlowe on this point emphasizes the interpretation given to the section by this particular office:

"A. We determine what kind of operation they are doing; first, whether they have ever had a license, what type of operation they are carrying on. If it looks like they are making a broadcast with an unlicensed transmitter and that they are old enough to realize what they are doing, and if they are using the radio for more than just to test or in preparation for getting a license.

Q. Then you go and talk to them, don't you, and find out what they are doing?

A. No, we don't. We judge from what they say on the air, what they do with it." (R. 283) * * *

It is respectfully submitted that the judgment of conviction should be reversed.

Respectfully submitted,

F. M. REISCHLING,
Counsel for Petitioners.

WARREN CHAN,
Of Counsel for Petitioners.

APPENDIX

Fourth Amendment to the Constitution:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment to the Constitution:

No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.

Section 318, Title 47, U.S.C.A.:

The actual operation of all transmitting apparatus in any radio station for which a station license is required by this Chapter shall be carried on only by a person holding an operator's license issued hereunder, and no person shall operate any such apparatus in such station except under and in accordance with an operator's license issued to him by the Commission: Provided, however, That the Commission, if it shall find

that the public interest, convenience, or necessity will be served thereby may waive or modify the foregoing provisions of this section for the operation of any station except (1) stations for which licensed operators are required by international agreement, (2) stations for which licensed operators are required for safety purposes, (3) stations engaged in broadcasting, and (4) stations operated as common carriers on frequencies below thirty thousand kilocycles: Provided further, That the Commission shall have power to make special regulations governing the granting of licenses for the use of automatic radio devices and for the operation of such devices.

Section 301, Title 47, U.S.C.A.—License for radio communication or transmission of energy.

It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission * * *. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any Territory or possession of the United States or in the District of Columbia to another place in the same Territory, possession, or District; or (b) from any State, Territory or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the U.S., or (c) from any place in any State, Territory, or possession of the United States to any place in any foreign country or to any vessel; or (d) within any State when the effect of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission

of such energy, communications, or signals from within said State to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States; or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter.

STATUTES

Section 1254, Title 28, U.S.C.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

Section 2101, Title 28, U.S.C.

* * * (f) If any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period alloted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay.

Section 3041, Title 18, U.S.C.

For any offense against the United States, the offender may, by any justice or judge of the United States, or by any United States commissioner, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any state where the offender may be found, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the office of the clerk of such

court, together with the recognizances of the witnesses for their appearances to testify in the case.

A United States judge or commissioner shall proceed under this section according to rules promulgated by the Supreme Court of the United States. Any state judge or magistrate acting hereunder may proceed according to the usual mode of procedure of his state but his acts and orders shall have no effect beyond determining to hold the prisoner for trial or to discharge him from arrest.

Section 3052, Title 18, U.S.C.

The Director, Assistant Directors, inspectors, and agents of the Federal Bureau of Investigation of the Department of Justice may carry firearms, serve warrants and subpoenas issued under the authority of the United States and make arrests without warrant for felonies cognizable under the laws of the United States, where the person making the arrest has reasonable grounds to believe that the person arrested is guilty of such felony and there is a likelihood of his escaping before a warrant can be obtained for his arrest.

Section 3053, Title 18, U.S.C.

United States marshals and their deputies may carry firearms and may make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony.

Section 781 (b) Title 49, U.S.C.

As used in this section, the term "contraband article" means—

(1) any narcotic drug which has been or is possessed with intent to sell or offer for sale in violation of any laws or regulations of the United States dealing therewith, or which is sold or offered for sale in violation thereof, or which does not bear appropriate tax-paid internal-revenue stamps as required by law or regulations;

(2) Any firearm, with respect to which there has been committed any violation of any provision of the National Firearm Act, as now or hereafter amended, or any regulation issued pursuant thereto; or

(3) Any falsely made, forged, altered, or counterfeit coin or obligation or other security of the United States or of any foreign government; or any material or apparatus, or paraphernalia fitted or intended to be used, or which shall have been used, in the making of any such falsely made, forged, altered, or counterfeit coin or obligation or other security.

COURT RULES

Revised Rules of the Supreme Court, Rule 36 (28 U.S.C.A.):

1. An appeal will be out of time unless, within the period fixed by statute, application for allowance is presented to the judge or justice who allows it. A prior timely application to another judge or justice does not extend the statutory period. See *Matton Steamboat Co., Inc. v. Murphy,* 318 U.S. 412, 63 S.Ct. 1126, 87 L.ed. 1483. In cases where an appeal may be had from a district court to this court the same may be allowed, in term time or in vacation, by any judge of the district court, including a circuit judge assigned thereto, or by a justice of this court. In cases where an appeal may be had from a circuit court of appeals to this court the same may be allowed, in term time or in vacation by any judge of the circuit court of appeals or by a justice of this court. In cases where an appeal may be had from a state court of last resort to this court the same may be allowed in term time or in vacation by the chief justice or presiding judge of the state court or by a justice of this court. The judge or justice allowing the appeal shall take the proper security for costs and sign the requisite citation and he may also, on taking the requisite security therefor, grant a supersedeas and stay of execution or of other proceedings under the judgment or decree, pending such appeal. See Rev. Stat., Secs. 1000 and 1007, paragraph 1 of Rule 10, paragraph 2 of Rule 46, and Rule 62(c) of the Rules of Civil Procedure. For stay pending application for review on writ of certiorari see Rule 38, Paragraph 6.

Revised Rules of the Supreme Court, Rule 38 (28 U.S.C.A.):

5. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

* * * (b) Where a circuit court of appeals has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter; or has decided an important question of local law in a way probably in conflict with applicable local decisions; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way probably in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

FEDERAL RULES OF CRIMINAL PROCEDURE, RULE 37(b) (18 U.S.C.A.):

(b) Petition for Review on Writ of Certiorari.

(1) Petition to the Supreme Court for writ of certiorari shall be made as prescribed in its rules.

(2) Time of Making Petition. Petition for writ of certiorari may be made within 30 days after entry of the judgment or within such further time not exceeding 30 days as the Court or a justice thereof for cause shown may fix within the 30-day period following judgment. If the judgment was entered in a district court in Alaska, Hawaii, Puerto Rico, Canal Zone or Virgin Islands, the petition shall be deemed in time if mailed under a postmark dated within such 30-day period. As amended Dec. 27, 1948, eff. Jan. 1, 1949.